No. 03-500

IN THE

Supreme Court of the United States

REPUBLIC OF AUSTRIA and
ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Petitioners,

-against-

DORIT WHITEMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a summary order of the Second Circuit simply remanding for development of an evidentiary record and to make findings as to predicate facts is ripe for review,

a. Where Petitioners, the Republic of Austria and its instrumentality ("Austria"), invoked purported "expectations of absolute sovereign immunity" from restitution claims involving Austria's commercial activities *after* World War II and continuing to date, as well as Austrian Holocaust-era conduct, and urged that the commercial activity and expropriation exceptions to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq. (the "FSIA"), were inapplicable; but where, in response:

b. Respondents demonstrated through uncontroverted documentary evidence – including formal statements of the President, the Secretary of State and the Senate, a Treaty and a host of Austrian writings – that Austria was not a sovereign from 1938 until 1955, and was on notice and understood, prior to and after the United States' 1952 adoption of the restrictive theory of sovereign immunity, that Austria could not have any such immunity expectation.

2. Whether this Court should review the Second Circuit's remand order, where Respondents demonstrated the applicability of the commercial activity, and expropriation exceptions to FSIA immunity, 28 U.S.C. §§ 1605(a)(2) and (a)(3), and such unrebutted proofs evidenced continuing and current commercial trafficking in stolen Jewish assets and property in the United States by Austria and its instrumentalities.

3. Whether this Court should review questions neither developed nor decided below, including the applicability of the political question doctrine to Austria's continuing and current commercial activity in the United States involving Aryanized

Jewish assets and property, where Austria's Notice of Appeal to the Second Circuit excluded review of such issues, the issues were not decided by any court below and the United States has acknowledged that its agreements with Austria have no preclusive effect on individual claims against Austria for commercial exploitation and expropriation of Aryanized Jewish assets and property.

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STATEMENT OF THE CASE

1. Petitioners ask this Court to review a garden variety summary order of the Second Circuit remanding proceedings to the district court to develop a sufficient factual record and to make findings on disputed factual claims.

Austria asserted that it had a "settled expectation of absolute immunity" from restitution claims arising out of both its post-war (and, indeed, current) commercial trafficking in Aryanized (*i.e.*, stolen) assets and property and its Holocaust-era conduct. In response, documentary evidence was submitted – including State Department minutes of a 1958 meeting between the Secretary of State and Austria's Chancellor – showing that Austria had no such expectation, but was, instead, on notice by the United States and fully understood that it did not have immunity from claims for mandated restitution.

Additionally, responding to Austria's claim that its pre-1952 conduct was excused by the 1952 Tate Letter, 26 *Dep't of State Bull.* 984-5 (May 19, 1952), in which the United States adopted the restrictive theory of sovereign immunity, a series of writings was submitted – including those of the President, the Secretary of State and the Senate, as well as Treaty provisos and admissions of the Austrian government – that Austria's sovereignty was not restored *until 1955* and, quite deliberately, it then was coupled with a restitution requirement.

These showings were not rebutted. On oral argument and again some weeks later, the Second Circuit called upon Austria and its supporting *Amicus*, the United States, to document Austria's position. The written submissions made by the United States, based on the State Department files, were devoid of documentation that Austria was entitled to invoke sovereign immunity expectations.

The Second Circuit remanded to develop a sufficient record and to make findings that would permit review of Petitioners'

claim to immunity.[1] Thus, stripped of rhetoric and fancied claims of conflicts among the Circuits, this Court is asked, prematurely, to review a simple direction that an adequate record be made to permit judicial review.

2. This case differs in several critical respects from *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *cert. granted*, No. 03-13 (2003), which pends review by this Court. *First*, Austria's sovereignty *prior to* the 1952 Tate Letter was erroneously assumed in *Altmann*, but negated here. *Second*, in *Altmann* the commercial exception to the FSIA was not invoked or considered. It is a principal predicate for the complaint herein. And, *third*, unlike here, no showing was made in *Altmann* of Austria's extensive and continuing practice of receiving, knowingly retaining and commercially trafficking, in the United States and elsewhere, in stolen Jewish assets and property.

3. The Second Amended Complaint, which Petitioners deliberately ignore, details a continuum of wrongs committed over two discrete, but related, time periods. From 1938 to 1945 Austria looted Jewish property as a precursor to annihilation of Austrian Jewry (*e.g.*, SA 7-9, 35). Austria's own Historical Commission has now confirmed those claims. *See infra*, pp. 3-4. As Justice Jackson observed, "[t]his was not the legitimate activity of a state within its boundaries, but was preparatory to the launching of an international course of aggression."[2]

After 1945, Austria (while not an independent sovereign) simply seized what remained of Jewish assets and property,

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1. The proofs relating to Austria's expectations and its sovereignty were largely presented by *Amicus Curiae*, the Austrian Jewish Community, including the Israelitische Kultusgemeinde-Wien, which for some 150 years has been the officially recognized representative of Austrian Jewry. It continues to support Respondents' position.

2. *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, June 6, 1945, *reprinted in* U.S. Dep't of State, Pub. No. 2420, *Trial of War Criminals* 6 (1945) and N.Y. Times, June 8, 1945, at 4.

including those held by its financial and business institutions, and, as a policy matter, retained and commercially used (in the United States and elsewhere) such assets and property as though they were forever Austria's. SA 17-25, 41-45, 65-67, 73. For instance, through Petitioner Osterreichische Industrieholding AG ("ÖIAG"), Austria sold in New York in 2001 interests in a partially privatized governmental entity that held Aryanized assets and property. SA 4, 37-38, 42-43.

The value of Aryanized Austrian Jewish assets has been estimated "at roughly $14 billion, of which 60 percent was never returned and never compensated."[3] The wrongs committed under the aegis of Austrians such as Adolf Eichmann, like so much Holocaust-era savagery, was of such magnitude as to defy ready comprehension. Justice Jackson's observation is apt: "The magnitude of this planned reversion to barbarism taxes the civilized imagination and the cruelty of its execution taxes credulity."[4] Four illustrations will facilitate comprehension.

(i) Defendant Dorotheum has for over a century been the Austrian-owned auction house, gallery and financial institution. In and after 1938, Hitler, Goering, Eichmann and their minions used the Dorotheum as the principal receiving and disposal point for art, antiques and other valuables seized

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3. Michael J. Bazyler, *Holocaust Justice* at 108 (New York University Press 2003) (citing Kenneth Timmerman, *Austria Confronts Its Dark Past (special report)*, Insight on the News, Aug. 12, 2002, at 24). Gestapo records indicate, according to Austrian Historical Commission Member Robert Knight, that, *at the time of the Anschluss*, the total value of looted Jewish properties was $1.2 billion, using the official *1938* exchange rate. Robert Knight, *Restitution and Legitimacy in Post-War Austria, 1945-1953* at 413-14 n.10 (Leo Baeck Institute 1991).

4. Justice Robert Jackson, Introduction to Whitney R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* xxxi (Southern Methodist University Press, 1954).

from Austrian Jewry.[5] It likewise has been documented that, *after* war's end, the Dorotheum continued trading in Aryanized or looted valuables that mysteriously surfaced in its possession, ranging from Schiele paintings to the Rothschild china to priceless Bloch-Bauer porcelains. SA 44-45, 48-49, 218-35, 552-86. And Dorotheum records show that those Aryanized valuables were offered for sale in catalogues distributed in the United States and in Dorotheum-"partner" entities located in New York and California. SA 67-68, 221, 580. Thus, on December 4, 2002, the Dorotheum again offered an Aryanized Schiele painting for sale in its US-distributed catalogues and through its US-"partner" galleries. SA 552-86.

(ii) The family of Respondent Kurt Schindler owned property, including a shop and factory that was Aryanized. After war's end, restitution was sought. Instead, at the behest of the Austrian authorities, and because of its profitability, the facility was transferred to Austria's State-owned Tobacco Monopoly (Austrian Tabak), which conducted commercial activity in the United States. The refusal to make restitution was so flagrant that, in annexes to the 1955 Austrian State Treaty (that conferred upon Austria independence and restored its sovereignty), restitution or compensation to the Schindler family was mandated. In 1996, ÖIAG received Austria's interest in Austrian

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5. The Austrian government's own Historical Commission in its Final Report issued in 2003 confirmed the Dorotheum's role as follows:

> In July 1938, the State Police in Austria were empowered to auction moveable property which had been confiscated from Jews. The sale of the more valuable objects usually took place by way of the Dorotheum auction house. Household goods were also put up for sale. The involvement of the Dorotheum – which had acquired a monopoly in the *Ostmark* – in the expropriation of property can be seen substantially in the sale of effects at all stages of persecution, with the exception of the final one of murder.

Final Report p. 5, available at http://historikerkommission.gv.at/english-home.html.

Tabak with instructions to privatize, which was completed in 2001. Austria pocketed the profits and refused to provide restitution or compensation. SA 13-17, 1412.

(iii) Hertha Field fled to the United States after enduring the horrors of the concentration camps and became a U.S. citizen. Her father, Dr. Weiss, a prominent Viennese Jew who had attained high honors under the Emperor, was murdered before her eyes. After the war, she claimed the proceeds of his insurance policies. In 1998, the New York State Banking Department formally confirmed the existence of five policies issued on the life of Dr. Weiss. The policies were transferred, together with the insurer entity (which had been taken over by Austria), to Defendant Raiffeissen Zentralbank Österreich AG, which operates a New York-licensed banking facility. No payment has been made to this day. SA 51-54.

(iv) Soon after war's end, Austria seized major enterprises, ranging from international banks to the Defendant industries that once were part of the notorious Nazi complex, Hermann Goering Werke, together with their accumulated assets (including those confiscated from Austrian Jewry). In the ensuing post-war years and continuing to date (during which time they conducted, and continue to conduct, business in the United States) Austria has "privatized" many of those enterprises, retained the proceeds and refused to make redress. SA 37-40. As recently as February 2001, Petitioner ÖIAG, a wholly-owned instrumentality of Austria, offered for sale and sold interests in one of the partially privatized entities through a New York investment banking firm. SA 37, 42-43.

Importantly, the documented averments of the Second Amended Complaint respecting the "economic damage done to Jews" have now been confirmed by the Austrian government's own Historical Commission. Final Report at 2-3. Literally thousands of Jewish-owned businesses, banks, real estate holdings, leaseholds and tenancies were Aryanized, as found by Austria's own Commission. *Id.* at 3-5.

Austrian Restitution laws, enacted at the insistence of the United States, while on their face seemingly sympathetic, were riddled with loopholes. SA 17-23. Their effectuation was further thwarted as a consequence of a Cabinet compact (only recently unearthed) under which the Austrian government committed itself, soon after war's end, to impede by all possible means restitution to the Jews.[6]

Expressed revulsion by the United States, at the blatantly anti-Semitic and neo-Nazi behavior of successive post-war Austrian governments spurred the United States' determination to compel restitution and to insure that Austria could have no expectation of immunity from individual restitution claims, as manifested under Articles 25 and 26 of the 1955 State Treaty. *See infra*, pp. 8-17.

REASONS FOR DENYING THE PETITION

Each of this Court's decisions relied upon by Petitioners to support claimed sovereign immunity – from *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812) to *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983) – presented two crucial elements absent here: (1) the expectation of immunity by (2) a friendly sovereign.

As the District of Columbia Circuit recognized in *Joo v. Japan*, 332 F.3d 679, 684-85 (D.C. Cir. 2003) and as the Ninth Circuit held in *Altmann*, 317 F.3d at 965-67, the historical evidence, as reflected in documents ranging from a Treaty to official U.S. and Austrian Government records, sets Austria apart, particularly in the context of restitution claims.

Here, the Second Circuit was presented with documentary evidence that Austria had no expectation of immunity for restitution claims and that it was not a sovereign until years

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6. Dokument 17, Protokoll 132 (Nov. 9, 1948) *quoted in* Robert Knight, *Ich bin dafür die Sache in die Länge zu ziehen* 146 (Böhlau, Vienna 2000) (literally: "I am in favor of dragging the matter out"). *See* discussion *infra*, pp. 12, 15 and SA 21-26.

after the 1952 Tate Letter confirming the United States' adoption of the restrictive theory of immunity.

Twice Austria and its *Amicus*, the United States, were directed by the Second Circuit to rebut that showing and twice they could not do so. Nonetheless, the Second Circuit felt obliged to insure that a complete record was presented and its order, here sought to be reviewed, simply directed remand for the purpose of making that record. *See United States ex rel. d'Esquiva v. Uhl*, 137 F.2d 903 (2d Cir. 1943). That determination is not the proper subject for review.

I. The Second Circuit's Interlocutory Order Does Not Warrant Review At This Juncture.

Austria's attempt to secure review of the Second Circuit's interlocutory order, which itself was jurisdictionally predicated upon a non-appealable interlocutory discovery order of the district court, does not warrant review.[7] *Pac. Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305 (1977). There, this Court denied issuance of the writ where, as here, the interlocutory discovery order of the district court "was not even appealable to the Court of Appeals under 28 U.S.C. § 1291, to say nothing of being appealable to this Court." *Id.* at 1306.

Likewise, remand for the development of the facts and an evidentiary hearing does not warrant review, either of that determination or the underlying merits. *See Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 755 (1986) (no appellate jurisdiction where the judgment is not final

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7. The district court, like the Second Circuit, did not issue any ruling on the merits of Austria's immunity claim. It simply ordered jurisdictional discovery in accordance with this Court's holding that jurisdictional defenses present a threshold issue, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Verlinden*, 461 U.S. at 493-94, and established Second Circuit precedent. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 139 (2d Cir. 2001); *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 747-48 (2d Cir. 2000).

and the case is remanded for further development of the facts); *Brhd. of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

II. Austria Was Specifically Advised By The United States That It Would Have No Expectation Of Immunity For Restitution Claims. Moreover, It Was Not A Sovereign Entitled To Assert Immunity For Pre-1952 Acts.

A. Austria's Expectations.

As late as *1958* – years after the 1952 adoption of the restrictive theory of immunity and years after the United States by Treaty declared Austria "re-established" as "a sovereign, independent and democratic State," (SA 957-86) – then Secretary of State John Foster Dulles cautioned Austrian Chancellor Julius Raab that he could not, as proposed by Austria, purchase "an end to Jewish claims"; neither would the United States Government "prevent private persons from advancing [restitution] claims or arguing with the Austrian Government." SA 990-91.[8] Deep disgust on the part of the United States, resulting from Austria's consistent post-war record of deliberately thwarting restitution, coupled with unabated anti-Semitism, provided the background for the United States' caution to Austria against any immunity expectations.

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8. Accordingly, in the 1959 official Exchange of Notes between the United States and Austria confirming agreements reached in May 1958, Austria was required to omit the clause it had sought to incorporate waiving its compliance with Article 26 of the 1955 State Treaty mandating restitution. Indeed, the United States Note, in paragraph 3, added that "nothing in your note affects the provisions of the second sentence of paragraph 1, Article 26 of the State Treaty in respect of any future measures." The sentence referred to was a Treaty undertaking by Austria that, "where return or restoration is impossible," Austria would accord "compensation." SA 981.

1. The Holocaust Years. It defies credulity to suggest that Austria, a war time enemy of the United States, could have had any expectation of immunity for its barbarism. In *Schooner Exchange*, Justice Marshall made clear that only a "foreign sovereign with whom the government of the United States is at peace . . . and demeaning herself in a friendly manner, should be exempt from the jurisdiction of [the United States]." *See Schooner Exchange*, 11 U.S. at 147; *Berg v. British & African Steam Nav. Co.*, 243 U.S. 124 (1917); *see also Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *The Santissima Trinidad*, 20 U.S. 283, 354 (1822). Certainly during the war Austria could not have had any such expectation.

To illustrate, on January 5, 1943, Austria was warned in the *London Declaration*, 8 *Dep't of State Bull.* 21 (Jan. 5, 1943), that all forced "transfers of, or dealings with property, rights and interests of any description whatsoever" in the Axis countries were subject to invalidation. SA 865. That warning was repeated a few months later in the *Moscow Declaration*, in which the U.S. and its allies declared that they were not bound by any changes effected in Austria since March 15, 1938, and Austria was reminded that it has "a responsibility, which [it] cannot evade, for participation in the war on the side of Hitlerite Germany." SA 870.[9] *See also Gold Declaration of February 22, 1944*, 9 Fed. Reg. 2096 (Feb. 23, 1944). And, the United Nations, following the 1944 Bretton Woods Conference, added its voice by demanding the return of all stolen assets within "occupied territory", including currency, art, securities and other so-called moveables "looted by the enemy." SA 872-76.[10]

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9. The *Moscow Declaration* was not without flaws. Thus, its suggestion that Austria was "the first victim of the Nazis" has *to this date* been the excuse Austrian politicians and many Austrians use to justify self denial.

10. For an apt summary of then-current judicial thinking, *see Weiss v. Lustig*, 185 Misc. 910, 911 (N.Y. Sup. Ct. 1945). By contrast, we have never been cited to any authority to support the notion implicit in

(Cont'd)

In 1949, at a time when the absolute theory of immunity for non-commercial activity held sway, the State Department was asked by counsel in then pending litigation to advise the Second Circuit as to the United States' position on judicial resolution of Holocaust-era claims. The responsive letter of Jack B. Tate, Acting Legal Adviser of the State Department, states the Government's policy with respect to restitution for Holocaust-era wrongs.[11] It also provides clarity as to what expectation Austria might reasonably have had, even post-war, as to its immunity for Holocaust-era restitution claims.[12]

In the "Bernstein letter," named after the litigation in which it was submitted, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), the Executive branch set forth a broad policy in favor of compelling "restitution of all Nazi-era forced transfers in the countries and peoples subject to their control" and relieving "American courts from *any* restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Id.* at 376; *State Department Release No. 296* (1949), *reprinted in* 20 *Dep't of State Bull.* 592-93 (May 8, 1949)(emphasis added). Omitted, however, from the version published in the *Bernstein* decision and later cases, were critical paragraphs of the April 13, 1949 Bernstein Letter and, importantly, the separate Official State Department statement issued two weeks later. 20 *Dep't of State Bull.* 592-93 (May 8, 1949).

(Cont'd)

Austria's submission that it knew about, cared about or relied upon immunity at or preceding war's end – with world conquest as its goal, it cared not a whit.

11. *See Verlinden*, 461 U.S. at 486; *see also Ex Parte Republic of Peru*, 318 U.S. 578, 586-87 (1943); *Hoffman*, 324 U.S. at 35.

12. Austria's "expectations" claims depend on what the Executive might have been expected to recommend at the time of the underlying acts. *See Landgraf*, 511 U.S. at 280; *see also Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 (1997); *Verlinden*, 461 U.S. at 486.

The omitted portions of the Bernstein letter were a lengthy series of citations to prior consistent U.S. Government statements and proclamations – including, among others, the 1943 London Declaration, the 1944 Gold Declaration, the 1945 Potsdam Agreement and the 1947 Military Government Law No. 59 on Restitution of Identifiable Property (all of which demanded restitution) – and which Mr. Tate cited as reflecting the established "policy of the Executive that "[t]his Government has consistently opposed the forcible acts of dispossession . . . practiced by the Germans on the countries or people subject to their controls " and for the restitution of which American courts were to be relieved from "any restraint upon their jurisdiction to pass upon the validity" of such acts. *Compare id.* at 593 *with Bernstein*, 210 F.2d at 376; App. 3a-7a.

Thereafter, on April 27, 1949, the State Department declared:

> The [Bernstein] letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that *it is this Government's policy to undo forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*[13]

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13. 20 *Dep't of State Bull.*, 592-93 (May 8, 1949)(emphasis added). Petitioners have argued that, because the Bernstein litigation turned on an Act of State defense, the Bernstein letter is likewise limited. That myopic view ignores the Bernstein letter as a whole, its citation of precedents that make clear that it reflected an established policy of the

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The Bernstein Letter and the later State Department Policy statement were, however, not alone in their post-war expression of United States policy during the period that the absolute theory of immunity applied.

Earlier (on March 4, 1949), Judge David Bazelon, then Assistant Attorney General and Director, Office of Alien Property, advised that, following consultation with the State Department and relying on some of the same precedents cited in the Bernstein letter, the Department of Justice's Office of Alien Property had concluded that no validity should be accorded Holocaust-era confiscatory and discriminatory acts and decrees. App. 1a-2a.

Thus, in and before 1949, State and Justice were as one in expressing the policy affording Austria no expectation whatsoever of immunity for Holocaust-era acts.

2. 1945 To Date. The war had barely ended when Austria demonstrated that little had changed. Recently unearthed Austrian Cabinet minutes reveal that on November 9, 1948, following a particularly vituperative assault upon Jewry and their rights by various Cabinet Ministers, the Interior Minister, Oskar Helmer proposed, and the Chancellor and Cabinet acquiesced, in adoption of Austria's policy to delay for so long as possible any restitution to Jews. *See* note 6, *supra.* And that was consistent with official Austrian policy and rhetoric of the time and thereafter.

In practical terms the post-war quest for restitution was "a competition" in which the "victims of 'Aryanization' faced

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Executive to mandate restitution and, importantly, the State Department's above-noted Statement, which was not limited to (or even part of) the litigation. Moreover, as Justice White noted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 n.18 (1976), the urged distinction is one without a difference where, as here, commercial activity is cited as a jurisdictional predicate. *See also Hoffman*, 324 U.S. at 35-36.

the 'gainers'" who ran across the economic and political post-war spectrum. SA 263. The choice, insofar as Austria's leadership was concerned, was simple when it came to Jews. Austria's first post-war Chancellor and later President, Karl Renner, who had enthusiastically endorsed the Anschluss and the "incorporation" of the Sudetenland, proclaimed as early as August 29, 1945:

> I think that in dealing with the Nazi problem we are getting into a critical situation . . . at the time of *Anschluss* all these little officials, these small citizens and businessmen did not have any far-reaching aims at all – at the most to do something to the Jews. . . .

SA 266. And again in demanding legislation for the return of property of his own Socialist Party, Renner stressed the "Realpolitik" of post-war Austria, stating "[a]fter all it would be quite incomprehensible if every small Jewish salesman or hawker is compensated for his loss" while his political party was not first in line. SA 267. Successive post-war Austrian governments acted, as a matter of official policy, to evade restitution, while avoiding "triggering 'all sorts of claims,' in particular from the Jews." SA 268. The old anti-Semitic refrains reemerged. Austria's Foreign Ministry addressed restitution as something that Austria should not legally be required to make as the "First Victim" of Nazism, but cautioned that Jewry not be aroused because "[i]t is not without reason that Jewry has been termed the fifth world power, on whose enmity Hitlerite Germany foundered." SA 269-70.

The American Military Occupying authorities were forced repeatedly to intervene, demanding, for example, the rescission of a law that undermined Jewish property rights. SA 270. The Austrian response though literally correct, "became a by-word for corruption" by officialdom. SA 270-71. Thus, the much-touted Third Restitution Law – which was premised on the 1943 *London Declaration* – was so replete with loopholes and discretionary enforcement mechanisms that it came to be viewed

as actually "favourable towards the 'Aryanizer'." SA 274-75. "Austria" argued it "had nothing to make good since it had done nothing wrong." SA 273.

It was against this background of official Austrian obstruction to restitution that negotiations began in 1947 on what became the 1955 State Treaty. And those discussions, as well as the restitution process, were soon complicated, primarily by East-West tensions, but also by a discernible Austrian tilt in favor of "former" Nazis. The voting rights of "less implicated Nazis" were restored and they soon became a political force to be reckoned with. SA 280-81. Alfons Gorbach, later Austria's Chancellor, proclaimed that his sympathy lay more with the "less implicated Nazis" and the ex-soldiers than with Jewish refugees:

> Nowhere in the events of recent years was there so much genuine decency, so much self-denying fulfillment of duty as with the soldiers of this war. . . .

SA 280. And, official Austrian Cabinet Minutes reveal that, on January 14, 1947, Chancellor Leopold Figl articulated the unchanged governmental anti-Semitism, damning restitution with the statement, "The Jews would like to become too rich too quickly." SA 1009. Vice Chancellor Schärf, later Austria's Federal President, went him one better: "Through the Jews entire regions in Austria have been ruined." SA 1019.[14]

In 1952, when the U.S. High Commissioner refused to approve a government-supported amnesty declaration for Austrian Nazis, the response was an anti-Semitic attack by Austrian Chancellor Raab on the "influence" of "emigrants," meaning naturalized American citizens of Austrian Jewish

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14. The virulent rhetoric has changed only slightly in recent years. Thus, Jörg Haider, whose party has been and is the essential coalition partner governing Austria in recent years, has publicly expressed his admiration for the SS, certain Hitler policies, and the like. *Austria: Review*, Europe Review World of Information, Oct. 20, 2003, at 1.

origin employed in the U.S. High Commissioner's office. And the attack was reiterated by the Austrian Cabinet when, in September, 1952, the High Commissioner objected to Nazis being compensated at the expense of their victims.[15]

American condemnation was manifested in stern warnings from Government officials. In July 1952, the State Department publicly proclaimed that "it is greatly disturbed to have received reports" on Austrian efforts to grant amnesty to and even promoting implicated Nazis, and forcing the reopening of restitution judgments and undoing restitution decrees.[16] United States vetoes of these Austrian actions were threatened and only their prospect reined in Austria's anti-Semitic extremism. *Id.*

Restitution was anathema.[17] Evasion and delay had long been the official Austrian policy as now is finally clear from Austria's official Cabinet Minutes. *See* note 6, *supra.* Amid cries that the Aryanizers had acquired Jewish property "out of altruistic motives," legislation crippling restitution was proposed

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15. *Vienna Is Critical of U.S. "Emigrants"*, N.Y. Times, June 18, 1952, at 14; *Austria Now At Odds With All The Powers*, N.Y. Times, Sept. 7, 1952, at B7.

16. *Austrian Amnesty Facing Veto by U.S.*, N.Y. Times, July 29, 1952, at 6; *see also* SA 280-81.

17. Restitution there was, but it was reticent, spasmodic and incomplete, as now confirmed by Austria's own Historical Commission. Republic of Austria Historical Commission Press Release, July 4, 2002, at 5-6. However, as the Preliminary Report discloses, available *at* http://www.historikerkommission.gv.at/english_home.html. (p.11), as does the Final Report, "non-fulfillment" of even that obligation was evident. Indeed on January 17, 2001, Austria acknowledged, in a Joint Statement with the United States, representatives of Austrian industry, Jewish groups, and plaintiffs' Counsel, that "taking into account all measures of restitution, compensation and social welfare benefits for victims of national socialism that were carried out by Austria in the past, that there were . . . gaps and deficiencies in such measures."

by the majority Parliamentary parties in July 1950. American Occupying Authorities were outraged, the American attaché stating, "if the Austrians were permitted to get away with so brazen a violation of one of the [proposed] Treaty terms it would serve as an indication of Austrian readiness to violate any other provisions of the Treaty without compunction." SA 280-81.

As negotiations for the Treaty threatened to collapse, Austrian Finance Minister Margaretha complained to American officials that Austria had "been told by the occupying powers that they couldn't have a treaty unless they passed the [restitution] law and now they [still] have no treaty and only a law which creates injustices." SA 280-81. Other Austrian officials commented "the number of Jews killed was relatively small," and American demands for restitution were "blackmail." SA 284-85. The Cabinet, though still adamant, cautioned secrecy, noting that tens of thousands of former Austrian Jews in America had to be reckoned with. SA 1023-36.

Against this background the 1955 State Treaty restoring Austria's sovereignty was adopted (*see* discussion *infra*, pp. 19-20). First, however, the State Department, responding to a request by Senator Herbert H. Lehman (echoing Senate Foreign Relations Chairman Alexander Wiley's prior demands), represented that it had already made known to Austria the United States' view "as to the wisdom of concluding a satisfactory agreement" on restitution claims "before the state treaty is presented to the Senate for ratification." 101(5) Cong. Rec. 6285-86 (May 13, 1955); *see Pay Jews' Claim, Austria Is Advised*, N.Y. Times, Mar. 9, 1954, at 8. Because Austria continued to stonewall, Austria, unlike Germany, was in Article 26 (as well as in Article 25) of that Treaty required to undertake an explicit obligation of restitution. SA 979-82.

So much, we submit, for the notion that Austria had any expectation of immunity prior to the 1952 Tate Letter. If any doubt at all remained Secretary Dulles laid it to rest in his

meeting with Austria's Chancellor in May 1958. *See supra*, p. 8.

B. Austrian Sovereignty.

The *sine qua non* of sovereign immunity is that the claimant be a sovereign (*Morgan Guar. Trust Co. of New York v. Republic of Palau*, 924 F.2d 1237 (2d Cir. 1991); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991)) at the time of the acts complained of (*Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)). However, Austria was not a sovereign from the March 1938 Anschluss until the 1955 Austrian State Treaty was ratified, granting her sovereignty and independence (well after the *1952* adoption of the restrictive theory of immunity). The point is indisputable.

On December 21, 1953, then Austrian Chancellor Julius Raab, in a formal communiqué, asserted lack of sovereignty to justify refusing restitution claims for heirless Jewish property:

> Answering this reproach made in the reply of the Jewish committee that the Government had changed its policy, the communiqué said that the Austrian Finance Minister had already made clear that his country could not entertain restitution claims "since the damages inflicted in Austria were done by a foreign power after the occupation of this country."
>
> . . .
>
> *In view of the fact that she is not fully sovereign* and has therefore been unable to fix a definite date by which restitution claims must be filed . . . , it has been impossible, the communiqué stated, for Austria to do more.

Austria in Denial of Jewish Charges, N.Y. Times, Dec. 22, 1953, at 16 (emphasis added).

Austria claims that, from 1938 to 1945, it was an occupied nation (Pet. 3). Former Austrian President Kurt Waldheim – the *éminence grise* of Austria's current government – agrees that

Austria's "sovereignty" ended in 1938 with its "occupation by German troops." Kurt Waldheim, *The Austrian Example* 44 (Ewald Osers trans., Weidenfed and Nicholson 1973). Similarly, on March 27, 1939, the Secretary of State notified the Attorney General in connection with litigation involving the sequestration of assets that "the United States recognizes that Austria has ceased to exist as an independent sovereign State and has been incorporated in the German Reich, and that Germany exercises *de jure* sovereignty over the territory of the former Republic of Austria." *See* Marjorie M. Whiteman, 2 Dig. Int'l L. 328 (1963) (quoting March 2 memorandum of Ralph Snowden Hill, quoting letter of Secretary of State Hull, dated March 27, 1939).[18]

With war's end Austria was not afforded sovereignty or independence. Instead, until 1955, Austria was divided into four occupied zones. As stressed by the United States in *United States v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, at *8 (S.D.N.Y. April 12, 2002), "[u]ntil the signing of the Austrian State Treaty in 1955, the allies would 'sit in judgment' of the Austrian government, in that all official acts required their approval." *Id.* While the trappings of governmental powers existed, final authority was in the hands of the Allied Powers. *Id.*; *see also Austria in Denial of Jewish Charges*, *supra*. In the vast Soviet zone, sweeping changes were fashioned without any

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18. In the ensuing years, the mixed messages emanating from the Executive caused the Second Circuit to comment that it was unable to resolve with any degree of clarity Austria's status. *See Uhl*, 137 F.2d at 906-07; *see also United States v. Schwartzkopf*, 137 F.2d 898 (2d Cir. 1943). *Cf. Land Oberoesterreich v. Gude*, 109 F.2d 635 (2d Cir. 1940), *cert. denied*, 311 U.S. 670 (1940). However, it was clear that whatever the *de jure* status of Austria may have been following the Anschluss, it lacked independence. Ludwig Adamovich, *Handbuch des Österreichischen Verfassungsrechts* 35 (1971)(President of Austria's Constitutional Court concluding that Austria lacked sovereignty prior to 1955). And, Austria which was soon cast in the role of an enemy, *see Uhl*, 137 F.2d at 904, was reminded in the Moscow Declaration "that she has a responsibility, which she cannot evade, for participation in the war at the side of Hitlerite Germany . . .". SA 870.

prior consultation whatsoever. SA 950-51. Likewise, the United States exercised veto power. *See, e.g., Austrian Amnesty Facing Veto by U.S.*, N.Y. Times, July 29, 1952, at 6.

The sovereignty notion also ignores the 1955 State Treaty and its expressed affirmation that its purpose and intent was the "re-establishment" of Austria "as a sovereign, independent and democratic state." SA 958. And, during ratification, President Eisenhower, Secretary of State Dulles and the Senate stated that the purpose and effect of the Treaty was to re-establish Austria in 1955 as a sovereign, following a 17-year lapse in sovereignty.

Article 1 of the 1955 State Treaty "re-established" Austria as "a sovereign, independent and democratic State." SA 958. Articles 25 and 26(1) directed that Austria would thereafter make full restitution (a) to all nationals (individual or corporate) of any of the United Nations (a defined term including all persons that had been treated as enemies in Austria during the war), and, importantly, (b) to all victims of religious or other persecution of all assets and properties seized, whether through legal artifice or force, on and after March 15, 1938. SA 979-82.

In submitting the Treaty to the Senate for ratification, on June 1, 1955, President Eisenhower stressed the Treaty's purpose and effect:

> The Treaty provides for the termination of the occupation and the reestablishment of Austria, within the borders as they existed on January 1, 1938, as a sovereign, independent and democratic state . . . .

SA 918-19. Secretary Dulles, in his Senate testimony urging ratification, added:

> Austria lost her independence before we were in the war, and now through the struggle . . . . we are in a position to give Austria back her independence.

SA 933. Secretary Dulles also stressed the Treaty mandate that "Austria will make restoration or provide compensation to

victims of Nazism, who were largely those of Jewish faith." SA 926.

The Senate Foreign Relations Committee Report urging ratification, reinforced these understandings, stating that the "main purpose" of the Treaty was to "establish Austria as a sovereign, independent, democratic state," noting "Austrian independence came to an end on March 13, 1938, when Nazi troops moved in and Hitler proclaimed its union with Germany in the so-called Anschluss. The Senate added:

> [T]he Austrian State Treaty . . . restores Austria to the status of independence it occupied before the Anschluss.

SA 956. Finally, the Senate stressed " Under article 26, property of which these [persecuted] individuals were deprived will be returned . . . .Where return or restoration is impossible, compensation will be granted ." SA 954.

And Austria's own historical view was aptly stated by Austrian Historical Commission Member Robert Knight: "[t]he State Treaty brought Austria the restoration of sovereignty and the departure of Allied Authorities." SA 287. *Accord* Adamovich, *supra*, at 35; Waldheim, *supra*, at 186.

The Legislative and Executive branches definitively spoke to Austrian sovereignty when that issue was squarely addressed in 1955: Austria was not a sovereign from 1938 to 1955. That judgment controls. *Jones v. United States*, 137 U.S. 202, 212 (1890), *quoted with approval in Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 311 (1918).

C. The Position Of The United States.

The Legal Adviser of the State Department joined with the Justice Department in appearing *Amicus* in the Second Circuit in support of Austria's application. On oral argument, the Court called upon them, in view of the above-noted showing, to produce any materials from the State Department's files that

would bear upon Austria's status from 1938 to 1955. In response, the United States was unable to point to a single document at variance with the foregoing.

Instead, the Legal Adviser and the Justice Department urged a distinction between Austria's retention of its "*de jure*" sovereignty during the Anschluss (on the theory that the United States rejected the legitimacy of the Anschluss) and "the State Department's position that 'Austria is *de facto* a part of Germany' ", adding that the Secretary of State, when asked contemporaneously to "clarify publicly the United States' position with respect to Austria's status, he responded that the United States' various steps with respect to Austria had been taken purely as a practical response to the *de facto* circumstances of effective German control, and did not signify *de jure* recognition of the Anschluss."

The Government thereby, unwittingly or not, conceded the point at issue here. Austria's inability to exercise its "*de facto*" sovereignty, *e.g.*, the "powers to declare and wage war, to conclude peace, to make treaties," *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), means that Austria was "not completely sovereign" and was not "independent", and therefore not entitled to any immunity as a sovereign until it was "re-established" as a "sovereign, independent and democratic state" under Article 1 of the 1955 State Treaty.[19] *Id.*

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19. "Independence" – *i.e.*, the absence of a "supreme authority above it [the asserted sovereign] that can interfere with its freedom of action within its realm", Steven Lee, *A Puzzle of Sovereignty, Sovereignty Either Is Or Is Not*, 27 Cal. W. Int'l L.J. 241, 252 (1997) – has long been recognized as the *sine qua non* of sovereignty. *See* Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. Pa. L. Rev. 1127, 1139 (1961); *Matimak Trading Co., v. Khalily*, 118 F.3d 76, 80 (2d Cir. 1997) ("courts have focused on whether the foreign state was recognized by the United States as a 'free and independent country'"); *see also Morgan Guar.*, 924 F.3d

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III. The FSIA Commercial Exceptions, And The Expropriation Exceptions, Apply To The Conduct Documented In The Second Amended Complaint. To The Extent Retroactivity Is Implicated By Austria's Continuing Conduct, This Court's Criteria Are Amply Met.

The courts below did not reach the issues attendant to applicability of the three distinct FSIA commercial exceptions, based upon (1) Austria's commercial activity conducted in the United States, *or* (2) its acts performed in the United States in connection with commercial activity abroad, *or* (3) acts committed outside the United States in connection with commercial activity abroad that caused a direct effect in the United States. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993). If one of these exceptions is found to apply, "the foreign sovereign is stripped of immunity, and, pursuant to 28 U.S.C. § 1330(a), jurisdiction exists in the district court. *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 148 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

The rationale of this established jurisdictional principle, expounded by Chief Justice Marshall in *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. 904, 907 (1824) and reiterated by this Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976), is that:

> In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns.

(Cont'd)

at 1243. Courts have long recognized the difference between the concept of legal existence and the capacity to sue or be sued. *Klinghoffer*, 937 F.2d at 48-49; *see also Land Oberoesterreich*, 109 F.2d 636-37. By any test, Austria was not "independent" from the time of the Anschluss in 1938 until the 1955 State Treaty.

> Instead, they exercise only those powers that can also be exercised by private citizens.[20]

Since the courts below did not address the commercial exception averments of the Second Amended Complaint (*see* SA 40-45) we need not dwell upon them here. Two illustrations suffice. The Dorotheum, owned by Austria, has for decades offered for sale and sold antiques, art objects and like valuables in the United States, both through catalogues and "partner" galleries. It was a principal vehicle employed by the Nazis in disposing of Aryanized objets d'art. In recent years, for example, stolen Schiele paintings, the Rothschild china and the Bloch-Bauer porcelains have "mysteriously" resurfaced in the hands of the Dorotheum and been offered for sale and sold through its customary channels, including those in the United States. SA 552-86. Such activity was repeated as recently as last year.

Another vehicle is Petitioner ÖIAG, the wholly-owned and controlled Austrian instrumentality which asserts sovereign immunity here. For the last several decades ÖIAG has been a principal vehicle through which Austria owns and operates its international commercial enterprises and controls their privatization. In February 2001 ÖIAG offered for sale in New York, through investment banking firms, interests in ÖIAG-held Austria Telekom, valued at approximately $1 billion, and filed Form F-1 and other required documentation with United States

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20. That principle applies with equal force "when a government becomes a partner in any trading company, [since] it [then] divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Planters' Bank*, *supra*. The point is apposite here since, following the war, Austria succeeded to the ownership of most of its major financial and industrial concerns (which held Aryanized assets and property and virtually all of which on a regularized basis engaged in commercial activity in the United States). Even though in recent years it embarked on limited privatizations, Austria retained a controlling interest in most of these entities (including various of the defendant companies).

regulators acknowledging that the proceeds were to be repatriated. SA 37, 42-43.

These illustrations also implicate the two distinct FSIA expropriation exceptions (28 U.S.C. § 1605(a)(3)) invoked in the Second Amended Complaint. They give rise to jurisdiction where

> rights in property taken in violation of international law are in issue *and* that property or any property exchanged for such property [1] is present in the United States in connection with commercial activity carried on in the United States by the foreign state; *or* [2] . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3) (emphasis added). Neither Petitioners nor the courts below confronted the applicability of the FSIA exceptions. Instead, because the acts complained of – even those of a recent and continuing nature – involve a continuum, often with beginnings in Holocaust-era wrongs, Petitioners maintain that they are barred by absolute sovereign immunity.

Petitioners' retrospective allusion ignores Chief Justice Marshall's counsel that when a foreign government engages in commercial activity in the United States – a claim implicated under branches of both the commercial and expropriation exceptions invoked here – "it divests itself . . . of its sovereign character" and is not immunized. *Planters' Bank*, 22 U.S. at 907; *see also Alfred Dunhill*, 425 U.S. at 695-96. Of itself, that provides a sufficient jurisdictional nexus.

However, even if one were required simply and solely to consider conduct occurring prior to the 1952 Tate Letter adopting the restrictive approach to claims of sovereign immunity (and if one were to assume that Austria then had an expectation

of absolute sovereign immunity or was, indeed, a sovereign), the result would be the same.

The FSIA (drafted primarily by the State Department) had for its purpose removing the Executive from precisely these kinds of disputes. *See Verlinden*, 461 U.S. at 487-88. Yet, if the analysis here urged by Petitioners is adopted, we are returned to the absolute theory of immunity that the 1952 Tate letter (and later the FSIA) had supposedly ended – with the outcome dependent on whether the Executive could be importuned into supporting immunity (as here has occurred) – as contrasted with the restrictive theory under which "immunity . . . does not extend to cases arising out of the foreign state's strictly commercial acts." *Id.* at 487. At the State Department's urging, Congress enacted the FSIA to bar precisely that result. *Id.* at 488. Once commercial activity conforming to one of the three commercial exceptions of the FSIA, or expropriation activity implicating specified commercial conduct is shown, "the foreign state shall be liable in the same manner and to the same extent as private individuals under like circumstances." *Id.* at 488-89 (quoting 28 U.S.C. § 1606).[21]

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21. Moreover, the notion that some inherent vice exists in permitting American courts to address these wrongs has, likewise, been addressed:

> Congress was aware of concern that "our courts [might be] turned into small 'international courts of claims[,]' . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." . . . . Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. § 1605. . . .

Verlinden, 461 U.S. at 490.

Petitioners argue, however, that at least the initial Holocaust-era conduct of Austria is excused and, perhaps, even those subsequent commercial events implicating those wrongs are immunized, because it is part and parcel of the continuing wrongs here demonstrated – *i.e.*, but for Holocaust-era Aryanization, the post-war and continuing wrongs (*i.e.*, continuing trading in stolen assets and property) would not have occurred and, therefore knowingly retaining and trafficking in plunder is licensed. The offensive nature of this assertion aside, it lacks merit.

To the extent that past conduct is implicated, it does not offend the "time-honored presumption against retroactive legislation". *Hughes Aircraft*, 520 U.S. at 940; *Landgraf*, 511 U.S. at 265-66. The FSIA exceptions do not "make unlawful conduct that was lawful when it occurred." *Hughes Aircraft*, 520 U.S. at 947 (quoting *Landgraf*). Whether viewed as a civil wrong under theories of replevin, conversion or fraud, or as one proscribed by statute (18 U.S.C. § 2314; N.Y. Penal Law §§ 165.54, 165.60 (McKinney's 1999); Strafgesetzbuch §§ 164(1), (2), Kommentar zum Strafgesetzbuch, Rz 13, Fabrizy, St. GB (2002), § 164 Rz 2), the wrong was actionable long before the 1952 Tate Letter. While the war was ongoing the United States, its Allies and the United Nations declared such conduct proscribed and proclaimed its revocability because it abridged international law, as well as Austrian law. *See Landgraf*, 511 U.S. at 281-82. Neither do the FSIA exceptions change the substance of the extant cause of action or create a new one or even provide added burdens. *Id.* at 282-83. The wrong was a wrong when committed.

The mere addition of a test for a *judicial* determination as to whether the wrong could be addressed in an American forum – as contrasted with having that same determination depend upon whether the Executive could in any given case be importuned to solicit or ignore immunity claims – adds neither a new liability or a new burden. It simply shifts

responsibility from the Executive to the Judicial branch to determine justiciability.

To repeat, since, at least 1824, it has been unquestioned law that, where a foreign government or its instrumentality engages in commercial activity in the United States and such conduct is fairly implicated in the wrongs charged, the foreign government is in no different position than a private citizen and is subject to the jurisdiction of our courts. *Planters' Bank*, 22 U.S. at 907-08; *Alfred Dunhill*, 425 U.S. at 695-96, 706. The Tate Letter did not alter that rule. All that the FSIA does is establish standards for a judicial determination as to whether the activity complained of falls within the rule.

IV. Review Of Questions Neither Developed Nor Decided Below Would Be Inappropriate.

Petitioners' Notice of Appeal to the Second Circuit circumscribed the issues sought to be reviewed, excluding the political question claim here raised (SA 46-47) and which neither the district court nor the Second Circuit adjudicated.

Because this Court does "not decide in the first instance issues not decided below," *National Coll. Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999), Austria's attempt to have this Court decide this issue in the first instance should be rejected. *See also Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) (issue was not "sufficiently developed below" would not be addressed); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to decide "in the first instance an issue on which the trial and appellate courts did not focus"); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 (1996) ("[W]e do not generally address arguments that were not the basis for the decision below").

Moreover, Austria's political question defense was not even ripe for determination by the courts below. *See Verlinden*, 461 U.S. at 493-94 ("At the threshold of every action in a District Court against a foreign state, therefore,

the court must satisfy itself that one of the exceptions [the FSIA] applies"); *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 139 (2d Cir. 2001) (court must "inquire at the 'threshold of every action' against a foreign state whether the exception to sovereign immunity that the plaintiff alleges permits the exercise of federal jurisdiction."); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)("other considerations relevant to justiciability," including the political question doctrine, were considered and rejected only after the "jurisdictional threshold" was satisfied).

Austria's political question defense is not only procedurally defective, it is also meritless. The doctrine excludes from judicial review only those cases "which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Manifestly, the judiciary has the power to interpret treaties and executive agreements, and render decisions that may affect the Executive's actions in the international arena. As this Court held in *Japan Whaling*, "courts have the power to construe treaties and executive agreements . . . and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*; *see also Kadic*, 70 F.3d at 248-50 ("Judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.").

Indeed, Austria's argument is contrary to the *very purpose* of the FSIA. *See Verlinden*, 461 U.S. at 487-88; H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6605-06. The existence of the FSIA, the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) and the Torture Victim Protection Act, 28 U.S.C. § 1350, aptly demonstrates that Congress intended the judiciary to hear disputes founded, as here, in specie of replevin, conversion, tort or fraud. *Klinghoffer*, 937 F.2d at 49-50.

Furthermore, Austria's argument that this Court's decision in *American Insurance Association v. Garamendi*, 123 S. Ct. 2374 (2003) lends support to their argument in favor of non-justiciability is wrong. *Garamendi* stands for the long established and commonplace proposition that under certain circumstances, the President has the power to enter into executive agreements, which may, in turn, preempt inconsistent state law. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

Garamendi does not support Austria's invocation of the political question doctrine here. First, Austria advocates deference to an executive agreement that by its express terms intentionally has no preclusive effect upon claims such as here tendered. The United States has already conceded this point in a Statement of Interest filed in an analogous Austrian case:

> The agreement negotiated is not a government to government claims settlement agreement, and the United States has not extinguished the claims of its nationals or anyone else.

SA 1-44. Second, Austria improperly attempts to abridge the 1955 Treaty by using the January 17, 2001 Agreement to alter rights and obligations established under the 1955 State Treaty, which, unlike the later executive agreement, was ratified by Congress and is considered "supreme Law of the Land." U.S. Const. art. VI, § 1, cl. 2. Third, *Garamendi* has nothing to do with the FSIA, and there can be no argument that Congress "implicitly approved" (*Dames & Moore*, 453 U.S. at 680) the dismissal of the FSIA claims herein when the FSIA was enacted to place the decision as to immunity solely within

the province of the courts. H.R. Rep. No. 94-1487, *at* 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6605-06.[22]

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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22. Austria invokes (Petition pp. 20-22) the so-called GSF, which it then misstates (*id.* at pp. 3-5). This is not the proper forum to exhaustively address the GSF, which has been widely assailed (*see, e.g.*, Bazyler, *Holocaust, supra* at 108). The senior American public official, who crafted the January 17, 2001 initiative on literally the eve of his departure from office (*id.)*, admits to having, soon thereafter, been retained by heirs to the Imperial Habsburg Dynasty to file a claim that would effectively exhaust much of its funds. App. 8a-16a. When questioned as to how the Imperial Habsburgs could potentially hijack a Fund proclaimed as having been created to affect restitution to Jews, that former U.S. official proclaimed that he had "purposely made the law" broad enough to cover all "victims." *Id.* Other flaws involved exclusion of all assets, securities, leased properties, intellectual property and other so-called movables that had been Aryanized (*see generally* SA 146-59). Also, if Austria had to any extent sheltered property in an entity that it did not exclusively control – from a majority - owned privatized company, to a governmental authority, to a province or municipality, and including all private entities and individuals – restitution was forever barred and the knowing holder of stolen property was licensed to retain it. Moreover, at Austria's behest there was shamefully included a proviso barring claims of aged and infirm survivors unless the Austrian Jewish Community and others surrendered their claims.

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APPENDIX

APPENDIX A — BAZELON LETTER, MAR. 4, 1949

OFFICE OF ALIEN PROPERTY
Department of Justice
Washington 25, D.C.

Mar 4, 1949

Seymour J. Rubin, Esq.
Attorney at Law
1822 Jefferson Place, N.W.
Washington 6, D.C.

Dear Mr. Rubin:

This is with reference to your letter of December 15, 1948, concerning the question whether this Office should utilize German discriminatory decrees as a defense to debt claims asserted under section 34 of the Trading with the Enemy Act, as amended. The Department of State has advised this Office that the Government of the United States has consistently opposed the recognition of German confiscatory and discriminatory laws, decrees and acts, and in this connection it referred to the Inter-Allied Declaration on Axis Acts of Dispossession of January 4, 1943; the Gold Declaration of February 22, 1944; Law No. 1 of the Allied Control Council; Military Government Law No. 1 (implementing certain provisions of J. C. S. 1067); and Military Government Law No. 59 dealing with Restitution of Identifiable Property. Accordingly, the Department of State was of the view that it is against the policy of this Government to accord any validity to the German confiscatory and discriminatory laws, decrees and acts insofar as they may be concerned in the consideration of claims filed against vested German assets. The Office of Alien Property, therefore, will not assert as a defense to debt claims filed under Section 34,

decrees, laws and regulations of the former government of Germany, enacted or promulgated during the period between January 30, 1933 and May 8, 1945, which discriminated against individuals because of membership in a political, racial or religious group.

I might add that the Department of State in reaching its conclusion gave consideration to the *Bernstein* case (163 F.2d 246 (C.A.2d, 1947)), and in this connection pointed out that there the court rested on what it stated to be the assumed executive policy, without, however, benefit of any indication from the executive branch as to what was in fact the executive policy.

Sincerely yours,

/signed/ David L. Baželon
David L. Baželon
Assistant Attorney General
Director, Office of Alien Property

APPENDIX B — TATE LETTER, APR. 13, 1949

THE DEPARTMENT OF STATE BULLETIN

* * *

Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers

[Released to the press April 27]

As a matter of general interest, the Department of State publishes herewith a copy of a letter of April 13, 1949, from Jack B. Tate, Acting Legal Adviser, Department of State, to the attorneys for the plaintiff in Civil Action No. 31-565 in the United States District Court for the Southern District of New York.

The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Copies of the letter were also sent to the court and to the attorneys for the other parties to the litigation. The letter is as follows:

April 13, 1949

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BENNETT, HOUSE, & COUTS,
Counselors at Law,
44 Wall Street,
New York 5, New York.

SIRS: You have brought to the attention of the Department Civil Action No. 31-555 now pending in the United States District Court for the Southern District of New York between Arnold Bernstein, plaintiff, and N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, also known as Holland-America Line, defendant, and Chemical Bank and Trust Company, third-party defendant, which involves certain matters treated in the case of Bernstein *v.* Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (C. C. A. 2d 1947), cert. den. 332 U.S. 772 (1947).

You have pointed out that the Circuit Court of Appeals in the Van Heyghen case stated:

> ". . . a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such." (page 250)

> ". . . no court will exercise its jurisdiction to adjudicate the validity of the official acts of another state." (pages 249-250)

The court held that the Executive had not "acted to relieve its courts of restraint upon the exercise of their jurisdiction" (page 250) or had not "indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar". (page 251) It was therefore concluded that in the circumstances the court was without power to inquire

into the acts of spoliation alleged to have been perpetrated on Bernstein in Germany in 1937-1938 in which Nazi officials of Germany were claimed to have been participants.

You have inquired whether the Department might care to express its view concerning the Executive policy of this Government with respect to the exercise by courts of this country of jurisdiction in such cases. The Department considers the matter an important one and is pleased to express its views as follows:

1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls. In this connection reference is made to the following:

a. Inter-Allied Declaration against Acts of Dispossession of January 5, 1943, United States Economic Policy toward Germany (Dep't State Pub. 2630) 52;

b. Gold Declaration of February 22, 1944, 9 Fed. Reg. 2096 (1944);

c. The Potsdam Agreement of August 2, 1945, 13 Dep't State Bull. 153 (1945);

d. Directive to the Commander-in-Chief of the United States Forces of Occupation Regarding the Military Government of Germany, April 1945, JCS 1067, paragraphs 4(d), 43(e)(2), 13 Dep't State Bull. 596 (1945);

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e. Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany, July 11, 1947, paragraph 17d, 17 Dep't State Bull. 186 (1947);

f. Law No. 1 of the Allied Control Council (Off. Gaz. of the Control Council for Germ. No. 1, Oct. 29, 1945);

g. Military Government Law No. 1 (Mil. Gov. Gaz.-U.S. Zone June 1, 1946);

h. Military Government Law No. 52, secs. 1(f), 2 (Mil. Gov. Gaz.-U.S. Zone June 1, 1946);

i. Military Government Law No. 59 on Restitution of Identifiable Property (Mil. Gov. Gaz.-U.S. Zone Nov. 10, 1947).

2. Of special importance is Military Government Law No. 59 which shows this Government's policy of undoing forced transfers and restituting identifiable property to persons wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945 for reasons of race, religion, nationality, id ology or political opposition to National Socialism. Article 1(1). It should be noted that this policy applies generally despite the existence of purchasers in good faith. Article 1(2).

3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

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Copies of this letter are being transmitted to Judge Sylvester J. Ryan and to the attorneys for the other parties to the litigation.

Very truly yours,

JACK B. TATE
Acting Legal Adviser

* * * *

APPENDIX C — HABSBURG ARTICLES

profil No. 24/03 of 06.06.2003 page: 31
Department: Austria

Habsburg recycling

Restitution. Much ado about the Habsburgs' chief consultant on issues of restitution: former US politician Stuart Eizenstat now uses his insider knowledge as a lobbyist.

It was a convincing performance. When Christian Habsburg-Lothringen, grandson of Emperor Karl I, gave a press conference little less than one month ago at which he announced the Habsburg clan's claims for restitution against the Austrian Republic of an estimated total of 200 million Euro he got himself a widely-known assistant: former US Deputy Minister of Finance Stuart Eizenstat.

In his capacity as the representative of the US government over the past couple of years Eizenstat had headed successful negotiations on restitution with Switzerland and Germany. The chief US negotiator also came to a comprehensive understanding on restitution with the Austrian Federal Chancellor Wolfgang Schüssel as recently as at the beginning of 2001. This man therefore is enjoying a top reputation in this field. And as an expert Eizenstat was then sitting next to Habsburg and said on the claims of the Habsburg family, "There is no doubt that the Habsburg family are victims of the National Socialist regime."

Eizenstat, who in the present Bush administration is no longer holding any political office, officially acts as "consultant" to the former Imperial family in the Habsburg case. In an interview with the daily "Der Standard" Eizenstat defined his role as follows, "Carl-Ludwig Habsburg contacted me

out of the blue and told me his family history. He convinced me to help me."

Swapping roles. Eizenstat's activities, however, cannot be explained through mere selflessness. So far the Austrian public has not been enlightened about all the details of the cooperation between the Habsburgs and Eizenstat. In addition to his work for the law firm of Covington & Burling the former politician since the end of 2001 has been working as a lobbyist for APCO Worldwide, one of the world's largest lobbying firms. In an interview with the "Public Affairs Newsletter" Brad Staples, the boss of APCO-Europe, showed himself highly satisfied about his new employee. Says Staples, "With Eizenstat we can offer our customers unique experience on a top level in both the US as well as European governments."

A bonus from which the Habsburg family obviously also wants to benefit. Representatives of Jewish organisations, however, are little enthusiastic about Eizenstat's activities. They accuse him of misusing his reputation in the negotiations on restitution to now as a lobbyist gain advantages for a new client. Andreas Reiner, legal counsel of Christian Habsburg-Lothringen, cannot understand the fuzz, "I have never heard about APCO before. Stuart Eizenstat is part of our team because he is an excellent lawyer and is familiar with the matter second to none. He just wants to consider all the victims for restitution."

Picture: Eizenstat (right) as lobbyist with Christian Habsburg-Lothringen
New job for former US politician
Picture: Eizenstat as negotiator with Schüssel (2001): top reputation in questions of restitution.

Appendix C

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The New York Times

May 10, 2003, Saturday, Late Edition-Final

SECTION: Section A; Page 3; Column 1; Foreign Desk

LENGTH: 635 words

HEADLINE: **Hapsburgs** Ask **Austria** to Return Estates Seized by Nazis

BYLINE: By PETER S. GREEN

DATELINE: PRAGUE, May 9

BODY:

The heirs to the **Hapsburg** dynasty, whose forebears ruled central Europe for over 600 years in an empire that once stretched from Russia to Spain, have asked the Austrian government to return forests, homes and a palace seized by the Nazis on the eve of World War II.

But their use of a law intended primarily to aid Jewish victims of the Holocaust has angered some in Vienna's Jewish community.

Christian von Hapsburg-Lothringen, a nephew of Otto von **Hapsburg,** the former pretender to the defunct **Hapsburg** throne, says the family wants back the more than $200 million worth of forests as well as four apartment buildings and the Laxenburg Palace near Vienna.

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The family was awarded the properties as compensation in 1918 when Emperor Charles I was forced to abdicate under the armistice agreement that ended World War I, which had been precipitated by the assassination of a **Hapsburg** archduke.

The **Hapsburgs** have enlisted the aid of a former American diplomat, Stuart Eizenstat, who negotiated the 1999 accords that won **Austria**'s Jews and others compensation for their suffering during the Holocaust.

Mr. Eizenstat, now a lawyer in Washington, said the **Hapsburg** family was seeking the return of about 60,000 acres of forest and, if it did not get back the buildings, either similar buildings in state hands or a total of $2 million from a special fund set up to compensate victims of the Nazis, including Jews, homosexuals, Gypsies and Hitler's political opponents.

The **Hapsburgs'** rule ended in 1918 when the family was forced to abdicate at the end of World War I. The Austro-Hungarian Empire, over which the **Hapsburgs** presided, was broken up and the family was awarded the land and buildings as a form of state pension. But when the Nazis occupied **Austria** in March 1938, the property was confiscated.

There is little doubt that the **Hapsburgs** lost their property because they opposed the Nazis. Otto von **Hapsburg** spoke out in **Austria** against Hitler and warned of dire consequences for Austria in the event of Anschluss, the incorporation of **Austria** into Germany.

Three of Otto's cousins enlisted in the United States Army and fought against the Nazis in World War II. A fourth cousin, Robert von **Hapsburg,** flew with the Royal Air Force against the German Luftwaffe during the Battle of Britain, in 1940. In exile in France, Otto and Carl-Ludwig

von **Hapsburg** helped persuade a diplomat from neutral Portugal to issue visas to thousands of Jews fleeing the Nazi advance, also in 1940.

"I was absolutely astounded by their story," said Mr. Eizenstat, speaking by telephone from Vienna. Mr. Eizenstat said that in 1999, Carl-Ludwig and Felix von **Hapsburg** were recognized by an Austrian court as victims of the Nazis, and were paid a symbolic sum of about $5.000 each, which, he said, they promptly donated to Jewish charity.

For decades, **Austria** refused to acknowledge that it was an active part of Hitler's Germany. Only in the 1990's did it finally agree to compensate most of the victims of the Holocaust and the Nazi era.

The **Hapsburgs'** claim has angered some representatives of Vienna's Jewish community, who fear that it will serve as a further excuse for **Austria** to delay compensation payments from a $210 million fund for Nazi victims, whose creation was negotiated by Mr. Eizenstat.

On Thursday, the Vienna Jewish Community announced that it would have to end its religious and educational programs unless the Austrian fund began to pay the compensation.

Mr. Eizenstat said the **Hapsburgs'** claim would not affect claims by Jewish victims of the Holocaust.

"We are not competing here with Jewish victims for compensation," Mr. Eizenstat said. "We purposely made the law so that it was not just for Jews but for all victims of national socialism."

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http://www.nytimes.com

GRAPHIC: Photos: Shortly after seizing **Austria** in the Anschluss in March 1938 and his triumphal entry into Vienna, Hitler confiscated properties that were awarded to the **Hapsburgs** when they abdicated following World War I. The **Hapsburgs**, who had ruled Central Europe for 600 years until 1918, had opposed the Nazi takeover of **Austria** before the outbreak of World War II. (Hulton Getty/Corbis); Otto von **Hapsburg** has hired an American lawyer to press his case. (A. Pauli/S. Brauer Photos)

LOAD-DATE: May 10, 2003

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Translation of Article from the daily newspaper "Der Standard", online issue dated June 11, 2003

derStandard.at/Politics/Opinion/Comments

"The Others' Comment": Fairness for Habsburg!
Debate on Compensation: Stuart E. Eizenstat responds to Josef Cap

I have great respect for Mr. Josef Cap and recognize his support, and that of the SPÖ, for the treaty of 2001 between Austria and the US. Nevertheless, I must protest against unjustified statements with respect to the restitution applications of the Habsburg family, published in this column ("Habsburg on the High Horse" (Habsburg auf hohem Ross), STANDARD, May 23). Mr. Caps seems to ignore historical facts and fundamental principles of the General Settlement Fund Law.

The assertion of Mr. Cap that "the Austrian people were entitled to" the assets of the Family Maintenance Fund (FVF), the restitution of which the Habsburg family demands, contradicts the extensive historical documentation with respect to the FVF's assets, such as the book by Mikoletzky published in 1961. Historical reviews show that the FVF's assets were always the family's private assets, and never state assets or assets which were taken from the Austrian people, as Mr. Cap asserts. Austria returned these assets to the Habsburg family in the thirties. In 1939, Hitler confiscated these assets as an act of political revenge.

Mr. Cap's legal assertions are also incorrect. It must be emphasized that the application to the Constitutional Court (VfGH), mentioned by Mr. Cap, was rejected solely on procedural grounds. The Supreme Court (OGH) decision of

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1995 was not yet based on a restitution claim of the Habsburg family (up to now, such claims have never been raised in court). Prof. Georg Graf, a member of the Austrian Historical Commission, in his official report to the commission in the past year voiced grave doubt concerning the correctness of the decision of 1995, and he reaches the result that the restatement of the constitution of 1933 in the year 1945 did not put the Republic of Austria "into lawful possession" of the assets of the FVF, and that the Habsburg Law of 1919 does not prohibit restitution.

In a decision of the year 1980 interpreting the Habsburg Law, which Mr. Cap does not mention, the Administrative Court (VwGH) states: "It contradicts all fundamental principles of Western legal systems to tie legal disadvantages . . . . only to the fact that the individual concerned comes of a certain family". This also applies to the Austrian legal system.

My engagement in this matter began at the end of 2001, long after the conclusion of the treaty in January 2001 between Austria and the US, and after my return to the private sector. I had never met the family before, nor heard of these claims. After thorough research, I decided to offer my support.

During the Second World War, the Habsburg family often opposed Hitler, thereby actually putting their lives at risk, and attempted to unify the Austrians against Hitler. After the "Anschluss", several family members served in the armed forces of the Allies, and supported Austrian Jews who fled from France. These are acts to be praised morally, which are recognized by the American Jewish community, as the express support of the restitution demands by Rabbi Andrew Baker and the "American Jewish Committee" shows. It is to be emphasized that the Habsburg family's restitution

demands in no way "compete" with the demands of Jewish victims.

The General Settlement Fund Law provides that all those shall be entitled to restitution, "who were persecuted by the Nazi regime on political grounds". This also includes the Habsburg family. Its status as descendants of the former monarchs of Austria-Hungary should be neither a special advantage, nor a special disadvantage. I do not see anything "disrespectful", as Mr. Cap has put it, in the family's restitution application. The aim of the General Settlement Fund Law is to set up a neutral arbitration body for demands arising from the Nazi era, and to keep these demands out of a politically-charged atmosphere. It was a considerable achievement, which has been made possible by the efforts and openness of Chancellor Schussel and others, among them also Mr. Cap. We all should respect the procedure provided by the General Settlement Fund Law, and permit the arbitration body to decide on the claims objectively and fairly, without political interference. (Translation [i.e., w the German newspaper article]: Michael Walker/ DER STANDARD, Print issue, June 12, 2003)

I confirm with reference to my oath at the above translation corresponds exactly to the attached photocopy.

Wien/Vienna, June 26, 2003

s/ Christian Malburg
Mag. Christian Malburg